(finding of fact 16); McIntosh II Decision at 6 (finding of fact 16); Timber Lake II Decision at 6 (finding of fact 16). The SDPUC assumed jurisdiction over the docket and set an intervention deadline. Doug Scott, a taxpayer from Dewey County, the Corson County Commission, and the McIntosh City Council intervened.

U S WEST subsequently filed an Amended Joint Application with the SDPUC which set forth changes in buyers of the Nisland, Newell, and McIntosh exchanges. As a result of the amendment, the Telephone Authority traded the Nisland exchange for the McIntosh exchange. Morristown II Decision at 5-6 (finding of fact 8); McIntosh II Decision at 5-6 (finding of fact 8); Timber Lake II Decision at 5-6 (finding of fact 8).[8]

On March 30, 1995, South Dakota Senate Bill 240, later codified as SDCL § 49-31-59, became effective pursuant to an emergency clause. It requires, among other things, SDPUC approval of the sale of exchanges, a separate vote for each individual sale, and further provides:

> The Legislature recognizes that the sale of telephone exchanges has a profound impact upon South Dakota, especially during a time when the world is undergoing a revolution in telecommunications technology. Because the sale of any exchange in our state directly affects the continued vitality and viability of rural South Dakota during that revolution, it is the Legislature's intent that the sale of each exchange be held to a high degree of scrutiny. Any sale of a telecommunications exchange shall be approved by a vote of the Public Utilities Commission. A separate vote is required on the sale of each exchange. In voting, the commission shall, if applicable, consider the protection of the public

[8]On May 18, 1995, the Telephone Authority entered into an agreement with State Line Communications to trade the Nisland exchange for the McIntosh exchange. The ICAA and U S WEST approved the agreement. As a result of this trade, the SDPUC scheduled another regional hearing to consider additional evidence which was held on May 25, 1995, at McIntosh. Morristown II Decision at 3; McIntosh II Decision at 3; Timber Lake II Decision at 3.

> interest, the adequacy of local telephone service, the reasonableness of the rates for local service, the provision of 911, Enhanced 911, and other public safety services, the payment of taxes, and the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will help promote economic development, tele-medicine, and distance learning in rural South Dakota. The commission shall issue its order pursuant to this section within one hundred eighty days of the filing of the application. For any application filed on or before March 30, 1995, the commission shall issue its order no later than August 1, 1995.

SDCL § 49-31-59 (emphasis added).

The SDPUC issued orders and held various regional hearings to receive evidence from the public regarding the proposed sale of exchanges. The SDPUC heard testimony in Mobridge, South Dakota, on April 17, 1995, and in McIntosh, South Dakota, on May 25, 1995, with regard to the proposed sales. Morristown II Decision at 2-3; McIntosh II Decision at 2-3; Timber Lake II Decision at 2-3. After the regional hearings concluded, the SDPUC held a final hearing in Pierre, South Dakota, from June 1 to June 4, 1995. Morristown II Decision at 3; McIntosh II Decision at 3; Timber Lake II Decision at 3. The SDPUC received evidence regarding all 67 exchanges that were up for sale. Forty-two witnesses testified and were available for cross-examination. The parties who testified at the four day hearing offered 126 exhibits, and parties filed an additional 19 exhibits as late filed exhibits. Subsequent to the hearing, the parties submitted briefs along with proposed findings of fact and conclusions of law.

The SDPUC issued separate orders for each of the proposed sales of 67 exchanges. With respect to the Morristown, McIntosh and Timber Lake telephone exchanges, the SDPUC rejected all the parties' proposed findings of fact and conclusions of law. *Decision and Order Regarding Sale of Morristown Exchange* at 7, In the Matter of the Sale of Certain Telephone Exchanges by

U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, No. TC94-122 (July 31, 1995) ("Morristown I Decision") (Attachment 10 hereto); *Decision and Order Regarding Sale of McIntosh Exchange* at 7, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, No. TC94-122 (July 31, 1995) ("McIntosh I Decision") (Attachment 11 hereto); *Decision and Order Regarding Sale of Timber Lake Exchange* at 7, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, No. TC94-122 (July 31, 1995) ("Timber Lake I Decision") (Attachment 12 hereto). Pursuant to the terms of the new statute, the SDPUC denied the sales of the Morristown, McIntosh and Timber Lake telephone exchanges to the Telephone Authority because due to the Telephone Authority's sovereign immunity: 1) it could not subject the Telephone Authority to SDPUC regulatory jurisdiction and thereby require it to comply with state law; 2) it could not enforce payment of taxes by the Telephone Authority; 3) it believed it would lose all regulatory authority over the three exchanges; 4) it found that the sale of the exchanges would have significant tax consequences to the taxpayers located in the cities, counties, and school districts within the Timber Lake, Morristown, and McIntosh exchanges; and 5) it found that the sale of these exchanges would constitute an improper delegation of authority under S.D. CODIFIED LAWS § 49-1-17 and, therefore, it had no authority to approve the sale of the exchanges. Morristown I Decision at 6-7 (conclusions of law 1-5); McIntosh I Decision at 6-7 (conclusions of law 1-5); Timber Lake I Decision at 6-7 (conclusions of law 1-5).

Significantly, the SDPUC entered findings of fact that the Telephone Authority refused to

waive its sovereign immunity in order to provide the SDPUC with statutorily mandated regulatory authority and that the Telephone Authority also failed to waive its sovereign immunity with regard to the collection of gross receipts taxes. The SDPUC specifically found that: 1) the Telephone Authority, as a tribal governmental entity chartered by the Cheyenne River Sioux Tribe, refused to waive its sovereign immunity; 2) because the Telephone Authority enjoys sovereign immunity, the State cannot enforce the collection of gross receipts and sales taxes from the Telephone Authority; 3) the SDPUC would lose regulatory authority over the exchanges after the sales; and 4) approval of the sales would result in an improper delegation of the SDPUC's authority. Morristown I Decision at 5-6 (findings of fact 12, 13, 16, 17, 20, 21, 22); McIntosh I Decision at 5-6 (findings of fact 12, 13, 16, 17, 20, 21, 22) ; Timber Lake I Decision at 5-6 (findings of fact 12, 13, 16, 17, 20, 21, 22). Thus, the SDPUC based its disapproval of the three exchanges to be sold by U S WEST to the Telephone Authority upon legal reasons and not technical operational reasons. There is no dispute that the Telephone Authority is an efficient, well- managed, and technologically current telephone operation.

U S WEST and the Telephone Authority jointly appealed the SDPUC's decisions to the South Dakota Circuit Court, Sixth Judicial district. On February 21, 1997, the Circuit Court determined that while the state's regulatory jurisdiction over the sales was not preempted by federal law, the SDPUC nevertheless improperly based its denial of the sales to the Telephone Authority upon the Telephone Authority's refusal to waive its sovereign immunity. Circuit Court Decision at 28-30.[9] Accordingly, the Circuit Court reversed and remanded the SDPUC's denial

[9]U S WEST and the Telephone Authority jointly appealed the portion of the Circuit Court's decision finding no federal preemption of state law to the South Dakota Supreme Court.

of the sale of the three exchanges because the SDPUC erroneously based its denial on the Telephone Authority's refusal to waive sovereign immunity, erroneously concluded that SDCL § 49-1-17 prohibited approval of the sale, and failed to enter findings of fact on each of the statutory factors listed in SDCL § 49-31-59. Id. at 2.

B. SDPUC ROUND TWO.

On remand, counsel for the SDPUC moved that the SDPUC decide the remanded issues on the record already before the SDPUC. *Motion on Remand*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (Apr. 2, 1997). The Telephone Authority filed a motion requesting that the SDPUC reopen the record to consider new evidence, and U S WEST joined the Telephone Authority's motion. *Response of the Cheyenne River Sioux Tribe Telephone Authority to Motion on Remand*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (Apr. 14, 1997) ("Response to Motion on Remand"); *Joinder in Response of the Cheyenne River Sioux Tribe Telephone Authority to Motion on Remand*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (Apr. 14, 1997). In requesting that the record be reopened, the Telephone Authority noted the

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That appeal is presently stayed pending the final outcome of the Circuit Court proceedings.

enactment of the Communications Act, the election of a new Commissioner, a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe, and the Telephone Authority's newly adopted dispute resolution procedures. Response to Motion on Remand at 4-7.

By Order dated May 7, 1997, the SDPUC required the parties to submit proposed findings of fact and conclusions of law on the record already before the SDPUC, thereby denying the Telephone Authority's motion to reopen the record. *Order for Submission of Findings of Fact and Conclusions of Law*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (May 7, 1997), as amended, *Amended Order for Submission of Findings of Fact and Conclusions of Law* (May 9, 1997). On June 2, 1997, the SDPUC received proposed findings of fact and conclusions of law from U S WEST and the Telephone Authority, intervenor Doug Scott, Commission Staff, Corson County Commission and the City of McIntosh. *Joint Proposed Findings of Fact, Conclusions of Law and Order Regarding the Sale of the Timber Lake, McIntosh and Morristown Telephone Exchanges of the Cheyenne River Sioux Tribe Telephone Authority and U S WEST Communications, Inc.*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (June 2, 1997); *Proposed Findings of Fact and Conclusions of Law of Intervenor Doug Scott*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain

Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (May 31, 1997); *Staff's Proposed Findings of Fact and Conclusions of Law Upon Remand*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (June 2, 1997); *Proposed Findings of Fact and Conclusions of Law of the Intervenors the Corson County Commission and the City of McIntosh*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (June 2, 1997).

At the same time, U S WEST and the Telephone Authority filed a motion requesting that the SDPUC take judicial notice of a dispute resolution mechanism adopted by the Telephone Authority by which subscribers to all telephone exchanges owned by the Telephone Authority may seek redress for their complaints, and a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe approving the Telephone Authority's operation of a telecommunications system on the Standing Rock Sioux Reservation. *Motion to Take Judicial Notice*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (June 2, 1997). The SDPUC staff filed its opposition to the judicial notice request claiming that the motion was inconsistent with the SDPUC's May 9, 1997 order refusing to reopen the record in this matter on remand from

the Circuit Court. *Resistance to Motion to Take Judicial Notice*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (June 4, 1997). U S WEST and the Telephone Authority replied, asserting that both documents constitute judicially cognizable facts within the meaning of South Dakota law; that both documents demonstrate compliance with state law by U S WEST and the Telephone Authority; and that, therefore, the SDPUC should grant the Motion filed by U S WEST and the Telephone Authority. *Reply of U S WEST Communications, Inc. and the Cheyenne River Sioux Tribe Telephone Authority to Resistance to Motion to Take Judicial Notice*, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-McIntosh, TC94-122-Morristown, TC94-122-Timber Lake (June 16, 1997). The SDPUC denied the motion for judicial notice, finding that "since the Circuit Court specifically remanded the case back to the [SDPUC] 'on the record' that taking judicial notice of these resolutions [dispute resolution and provisions certificate] would supplement the record in contravention of the Circuit Court's Order." Morristown II Decision at 4; McIntosh II Decision at 4; Timber Lake II Decision at 4.

For all three exchanges, the SDPUC ultimately voted to deny the sale because "the sale is not in the public interest . . . ." Morristown II Decision at 9 (conclusion of law 9); McIntosh II Decision at 9 (conclusion of law 9); Timber Lake II Decision at 9 (conclusion of law 9). The SDPUC rejected all of the findings of fact and conclusions of law proposed by the parties, and

entered its own findings of fact and conclusions of law on the statutory factors listed in SDCL § 49-31-59 for each of the exchanges. Morristown II Decision at 10 (conclusion of law 10); McIntosh II Decision at 10 (conclusion of law 10); Timber Lake II Decision at 10 (conclusion of law 10). In addressing the statutory criteria, the SDPUC entered identical findings and conclusions for all three exchanges. With the exception of the payment of taxes, the SDPUC found that the sale of the exchanges to the Telephone Authority would meet the statutory standards save for the fact that the SDPUC was "unable to require, as a condition of the sale," that the Telephone Authority comply with the various statutory standards. See, e.g., Morristown II Decision at 8 (finding of fact 25); McIntosh II Decision at 8 (finding of fact 25); Timber Lake II Decision at 8 (finding of fact 25). The SDPUC also noted that if it approved the sales, the Telephone Authority "would not recognize the [SDPUC] as having regulatory authority" over the exchange in question. Morristown II Decision at 7 (finding of fact 18); McIntosh II Decision at 7 (finding of fact 18); Timber Lake II Decision at 7 (finding of fact 18). The SDPUC's findings are unclear in that they do not distinguish between the sovereign immunity of the Telephone Authority and the general lack of state regulatory authority over on-reservation affairs of Indian tribes.[10]

In addition, the SDPUC held that because "CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the

[10]The various findings of the SDPUC are also confusing in that they refer to the SDPUC's understanding of the Telephone Authority's position on the extent of SDPUC enforcement and regulatory authority rather than describing the SDPUC's perspective on the scope of its authority after the sale. See, e.g., Morristown II Decision at 7 (finding of fact 18); McIntosh II Decision at 7 (finding of fact 18); Timber Lake II Decision at 7 (finding of fact 18).

sale would result in the loss of significant tax revenue . . . ." Morristown II Decision at 7 (finding of fact 23); McIntosh II Decision at 7 (finding of fact 23); Timber Lake II Decision at 7 (finding of fact 23).[11] The SDPUC acknowledged the Telephone Authority's willingness to pay the gross receipts taxes on its services to non-Indian customers but relied on the Telephone Authority's statement about enforcement to conclude that tax revenue would be lost. Morristown II Decision at 6 (finding of fact 13), 7 (finding of fact 23); McIntosh II Decision at 6 (finding of fact 13), 7 (finding of fact 23); Timber Lake II Decision at 6 (finding of fact 13), 7 (finding of fact 23).

In the end, the SDPUC denied the sale of each exchange on the grounds that: 1) it could not impose conditions on the sale of the exchange in question; 2) it might lose regulatory authority over the exchanges after the sales; and 3) because state tax revenues might decrease because the Telephone Authority enjoys sovereign immunity under federal law.

U S WEST and the Telephone Authority again jointly appealed the SDPUC's second round of denials to the Circuit Court. *Joint Notice of Appeal*, Cheyenne River Sioux Tribe Telephone Authority v. South Dakota Public Utilities Comm'n, No. 97-348 (S.D. Cir. Ct. Sept. 8, 1997). In their joint brief, filed November 14, 1997, U S WEST and the Telephone Authority argued the following issues:

> I. Whether the decisions of the SDPUC denying, after remand from the Circuit Court, the Telephone Authority's application to purchase the Timber Lake, Morristown, and McIntosh telephone exchanges should be reversed pursuant to SDCL § 1-26-36.

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[11]Again, the SDPUC refers to the Telephone Authority's position on the ability of the State to enforce collection rather than stating its own position on whether such taxes may be collected.

II. Whether the SDPUC abused its discretion by failing to reopen the record on remand, by failing to take judicial notice of a dispute resolution mechanism adopted by the Telephone Authority by which subscribers to all telephone exchanges owned and operated by the Telephone Authority may seek redress for their complaints, and by failing to take judicial notice of a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe on April 2, 1997 advocating the Telephone Authority's operation of a telecommunications system on the Standing Rock Indian Reservation.

III. Whether, under well-established principles of federal Indian law, the SDPUC's interpretation of SDCL § 49-31-59 may be invoked to preclude the Cheyenne River Sioux Tribe, a federally recognized Indian tribe, and/or its governmental entities from acquiring, owning, operating and regulating telephone exchanges in Indian country on account of tribal immunity under federal law.

IV. Whether the SDPUC's refusal to approve U S WEST's and the Telephone Authority's joint application respectively to sell and purchase the Morristown, McIntosh and Timber Lake telephone exchanges on the grounds that the SDPUC would lose taxation and regulatory authority over those exchanges violated the Circuit Court's order of remand which prohibited the SDPUC from basing its denial of approval of the telephone exchange sales on the Telephone Authority's refusal to waive sovereign immunity.

V. Whether the SDPUC's refusal to approve U S WEST's and the Telephone Authority's joint application respectively to sell and purchase the Morristown, McIntosh and Timber Lake exchanges based on the SDPUC's application of SDCL § 49-31-59 on the grounds that the SDPUC would lose taxation and regulatory authority over those exchanges constituted a denial of equal protection under the law in violation of the Fourteenth Amendment to the United States Constitution and Article VI, § 18, of the South Dakota Constitution.

Joint Statement of Issues, Cheyenne River Sioux Tribe Telephone Authority v. South Dakota Public Utilities Comm'n, No. 97-348 (S.D. Cir. Ct. Sept. 18, 1997); *Joint Brief of the Cheyenne River Sioux Tribe Telephone Authority and U S WEST Communications, Inc.*, Cheyenne River

Sioux Tribe Telephone Authority v. South Dakota Public Utilities Comm'n, No. 97-348 (S.D. Cir. Ct. Nov. 14, 1997). The appellees filed their response briefs on December 16, 1997, and the Telephone Authority and U S WEST must file their reply briefs by mid-January. Oral argument is scheduled for the first part of February, 1998.

APPENDIX B

A. INDIAN TRIBES AND THEIR GOVERNMENTAL ENTITIES ENJOY SOVEREIGN IMMUNITY AS A MATTER OF FEDERAL LAW.

The purchase by the Telephone Authority of the three exchanges would further the federal policies of tribal economic development and self-governance set forth in the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA"), the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n ("Indian Self-Determination Act"), and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1544 ("Indian Financing Act"). The SDPUC, as an arm of the State of South Dakota, may not deny to Indian tribes, on account of their status as federally recognized Indian tribes immune from suit, the economic development opportunities otherwise available to non-Indian citizens. Accordingly, the SDPUC may not apply the elements of SDCL § 49-31-59 in general and, in particular, the requirements to consider the payment of taxes and the lack of SDPUC regulatory authority over the Telephone Authority to foreclose the Telephone Authority's ability to purchase the three exchanges. To prohibit the Tribe from participating in such activities would frustrate well-established federal policies and thus is preempted by federal law.

The Cheyenne River Sioux Tribe's establishment of the Telephone Authority as a vehicle to foster tribal and reservation economic development is well-grounded in federal law. For example, the Indian Financing Act states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts

> comparable to that enjoyed by non-Indians in neighboring communities.

25 U.S.C. § 1451. The Indian Self-Determination Act reflects similar purposes. Indeed, the purpose of the IRA, which remains the core of present day federal Indian policy, was "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H. R. REP. NO. 1804, 73d Cong., 2d Sess., 6 (1934)). See generally White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n.10 (1980). "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987).

The Commission has recognized that Indian tribes and tribally chartered entities enjoy sovereign immunity as a matter of federal law. In In the Matter of AB Fillins, No. FCC 97-238, 1997 WL 431386 (F.C.C. July 2, 1997), the Commission addressed the issue whether § 253 authorized the preemption of tribal law that prohibited a non-Indian company from placing cellular telephone antennas on the Sells Indian Reservation. In holding that the § 253 authorized the Commission to preempt only State and local law, and not tribal law, id. ¶ 16, the Commission found that the Tohono O'odham Nation "has sovereign authority over all lands within the Sells Reservation . . . ." Id. ¶ 4. The Commission continued:

> In general, federal policy favors the strengthening of tribal self-government. Thus, "as proper respect for both tribal sovereignty itself and for the plenary authority of Congress" has caused the courts to hesitate to imply any preemption of tribal authority absent an express statement of legislative intent. The same principles of

> respect for tribal and Congressional authority lead us, in the absence of a clear Congressional authorization, to decline to preempt Native American power over tribal lands.

Id. ¶ 18 (citing Iowa Mutual Ins. Co. v. La Plante, 480 U.S. 9, 14 (1987); Merrion v. Jicarilla Apache Tribe, 445 U.S. 130, 149 (1982) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978))).

The courts consistently have endorsed the notion of tribal sovereign immunity as an important part of the federal law related to Indian affairs. Martinez, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940) ("These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.") (citations omitted); Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989); In re Greene, 980 F.2d 590 (9th Cir. 1992), cert. denied, 510 U.S. 1039 (1994). As recently as 1991, the Court reaffirmed that Indian tribes enjoy their inherent sovereign immunity and rejected a state's contention that the doctrine should be either narrowed or eliminated when a tribe engages in the operation and regulation of a business activity. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509-510 (1991).

In short, tribal sovereign immunity, economic development and self-governance form the

foundation for modern day federal Indian policy. The Telephone Authority, a division of the Cheyenne River Sioux Tribe, is presently engaged in business on the Cheyenne River Sioux Reservation. It provides services that are carefully tailored to meet the needs of tribal members while at the same time providing the technical services required to stimulate the local economy which is composed of Indian and non-Indian consumers. The Tribe has now decided that the Telephone Authority should purchase the Timber Lake exchange on the Reservation as well as the Morristown and McIntosh exchanges on the Standing Rock Sioux Reservation. See Cheyenne River Sioux Tribe Resolution No. 180-94-CR (June 1, 1995) (Attachment 13 hereto).

It is beyond question that the purchase of the three exchanges is in furtherance of the federal policy of tribal economic development and self-governance. As discussed below, state law may not be invoked to frustrate the advancement of those policies. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). See also Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 270 (1982 ed.) ("The Indian preemption decisions are highly protective of tribal self-government in Indian country and allow minimal application of state law.").

B. STATES MAY NOT APPLY STATE LAW TO INDIAN TRIBES AND TRIBAL ENTITIES SO AS TO FRUSTRATE THE FEDERAL POLICY OF TRIBAL ECONOMIC DEVELOPMENT AND SELF-GOVERNANCE BY DENYING TRIBES THE SAME OPPORTUNITIES AVAILABLE TO NON-INDIAN STATE CITIZENS.

In Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) ("Wold II"), the United States Supreme Court struck down an effort by North Dakota to refuse tribal access to state court based upon federally protected tribal sovereign immunity, stating that "in the absence of federal authorization, tribal immunity, like all aspects of

tribal sovereignty, is privileged from diminution by the States." Id. at 891. The Supreme Court held that the North Dakota statute in question was preempted by federal law on account of the federal and tribal interests at stake, including the tribal right to self-government. In reaching its conclusion, the Supreme Court counseled that "[t]he North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts." Id. at 889. After reviewing the state statute's provisions related to the application of state law, the Court concluded that "[t]his result simply cannot be reconciled with Congress' jealous regard for Indian self-governance." Id. at 890 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. at 334-335 ("both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.")) (other citations omitted).

In language that is directly relevant here, the Court expressly rejected the notion that North Dakota could condition access to its courts on a waiver of tribal sovereign immunity, stating:

> [North Dakota's] requirement that the Tribe consent to suit in *all* civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. See, e. g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Of course, because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Cf. also McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973). And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. See Santa Clara Pueblo v. Martinez, supra, 436 U.S. at

> 58. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Id. at 890-891. The Court thus concluded that "the State's interest is overly broad and overly intrusive when examined against the backdrop of the federal and tribal interests implicated in this case." Id. at 893 (citing Rice v. Rehner, 463 U.S. 713, 719 (1983)). See also Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1065 (10th Cir. 1995) ("Without an explicit waiver, the Nation is immune from suit in state court -- even if the suit results from commercial activity occurring off the Nation's reservation."), cert. denied, 116 S. Ct. 57 (1995).

Wold II is directly on point here. Plainly, a state has jurisdiction over its own courts. Nevertheless, it may not enact a statute controlling access to those courts that interferes with federal policy towards Indian tribes. Here, state law may not be applied so as to deny Indian tribes the same rights -- such as engaging in business activities -- available to non-Indian state citizens merely because tribes are immune from state regulation and taxation. The Supreme Court has unequivocally rejected state attempts to block tribal access to state court based upon tribal characteristics under federal law. Similarly, the SDPUC may not invoke state law to deny the Cheyenne River Sioux Tribe the right to engage in business in Indian country on account of its federal law immunity from state regulation and taxation.

Well-settled federal Indian law thus prohibits the SDPUC from frustrating the federal policy of tribal economic development and self-governance by applying state law -- in this case SDCL § 49-31-59 -- so as to deny the Telephone Authority the right to purchase telephone exchanges that it could acquire if it were not a tribally chartered corporation with immunity

conferred under federal law. The recurring theme in the SDPUC's decisions is the SDPUC's inability to enforce the collection of taxes arising from the Telephone Authority's purchase of the Timber Lake, Morristown and McIntosh telephone exchanges as well as the SDPUC's lack of continuing regulatory authority. See Morristown Order II at 6 (findings of fact 13, 15), 7 (finding of fact 23), 8 (finding of fact 25(1)); McIntosh Order II at 6 (findings of fact 13, 15), 7 (finding of fact 23), 8 (finding of fact 25(1)); Timber Lake Order II at 6 (findings of fact 13, 15), 7 (finding of fact 23), 8 (finding of fact 25(1)). That concern exists only because of the Telephone Authority's status pursuant to federal law.

Under Wold II and its progeny, the determination by the SDPUC that it might lose regulatory authority and cannot enforce the collection of gross receipts and sales taxes if the Telephone Authority purchases the Timber Lake, Morristown and McIntosh telephone exchanges, cannot form the basis of a refusal to approve the sale to the Telephone Authority. The Cheyenne River Sioux Tribe enjoys sovereign immunity under federal law. As a tribally chartered corporation, the Telephone Authority has the same immunity. Denial of the sales of the Morristown, McIntosh and Timber Lake telephone exchanges based upon the Telephone Authority's federally protected characteristic as immune from suit violates well-settled federal law because, as construed by the SDPUC, the state law in question interferes with the accomplishment of federal Indian policy and thus is preempted.

Like the "weighty" federal interest, unambiguously expressed in the Communications Act, in opening and maintaining avenues for competition in the telecommunications services field, so too is the federal interest in opening and maintaining avenues for the Cheyenne River Sioux Tribe

and other tribes to develop economically clearly indicated. The SDPUC's decision on the sale of the three telephone exchanges, if upheld, would likely be precedent for much the same result in the case of any traditionally state-regulated business in which Indians transact business with non-Indians. Assuming a continuing unwillingness by the Tribe to relinquish its tribal sovereignty and self-government, the limited spectrum of economic activity and the level of economic health attainable by Indian enterprises and reservation economies would be a far cry from the goals of the Congress and President as noted above. Instead, an interracial, broad-spectrum economy is the key component of achieving the federal goal of an healthy reservation economy. See Transcript of June 1-4 hearing at 770-79 (testimony regarding importance of affordable state-of-the-art telecommunications to health care, education and economic development on the reservations of the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe and the commitment of the former thereto) (Attachment 14 hereto).

Finally, as in Wold II where access to the state court system required submission to state law in litigation and a waiver of sovereign immunity, in this case the Cheyenne River Sioux Tribe would have had to submit to SDPUC regulation, state and local taxation, and to non-Indian participation in the Tribe's political process. In other words, in order to acquire these three telephone exchanges from U S WEST, the Cheyenne River Sioux Tribe would have to relinquish not only those essential characteristics of tribal self-government and sovereignty also at stake in Wold II but also the continuing integrity of its government as a tribal government. The intrusion on tribal self-government and sovereignty in this case, thus, is even more severe than that in Wold II.

In Wold II, the Supreme Court decided in favor of tribal self-government and sovereign immunity despite the "perceived inequity" of allowing suits in state court by Indians against non-Indians but not by non-Indians against Indians, noting that the same "perceived inequity" exists for suits by and against the United States and the State of North Dakota. 476 U.S. at 893. In this case, there is no "perceived inequity" other than perhaps the immunity of Indians from state and local tax in certain circumstances and the inability of non-Indians to participate in tribal elections. Yet municipalities and other local political subdivisions in South Dakota can own telephone exchanges while remaining immune from tax liability to the State. See S.D. CONST., art. XI , § 5; SDCL § 10-33-30. Citizens from other states may not vote in South Dakota elections despite their subscription to South Dakota telephone service. S.D. CONST., art. VII.

In sum, by basing its denial of the telephone exchange sales upon the perceived negative effects of the Telephone Authority's sovereign immunity, the SDPUC has violated well-settled principles of federal law protecting and encouraging tribal sovereign immunity and self-governance.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 22 day of January, 1998, hand-delivered a true copy of the foregoing **The Cheyenne River Sioux Tribe Telephone Authority's and US WEST COMMUNICATIONS, INC.'s Joint Petition for Expedited Ruling Preempting South Dakota Law** to the following:

Chairman William Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Richard Metzger, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

that the original and five copies were mailed to:

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.,
Washington, D.C. 20554

and two copies were mailed via overnight carrier to:

William Bullard, Executive Director
Cameron Hoseck, Special Assistant
Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

FEB 1997

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

* *

CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY and U.S. WEST COMMUNICATIONS, INC.,

Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA,

Appellee, and

CORSON COUNTY COMMISSION, McINTOSH CITY COUNCIL and DOUG SCOTT,

Intervenors.

CIV. NO. 95-288

MEMORANDUM DECISION

* *

The Cheyenne River Sioux Tribe Telephone Authority (CRSTTA), an entity of the Cheyenne River Sioux Tribe (CRST), and U.S. West Communications, Inc. (US West) appeal from a decision of the South Dakota Public Utilities Commission (Commission). The Commission disapproved US West's proposed sale of three local telephone exchanges (Timber Lake, McIntosh and Morristown) to the CRSTTA. Approximately one-half of the Timber Lake exchange is located on the Cheyenne River Indian Reservation. The remaining portion of the Timber Lake exchange, and the other two exchanges, are not located on the Cheyenne River Indian

ATTACHMENT 1

Reservation.[1] The CRSTTA and US West contend that tribal sovereignty considerations deprived the Commission of jurisdiction to disapprove US West's proposed sale. Alternatively, they contend that if the Commission had jurisdiction, the decision violated numerous statutory and constitutional provisions. This Court concludes that the Commission had jurisdiction to disapprove US West's proposed sale. The Commission's decision is, however, reversed and remanded because the Commission impermissibly conditioned its decision upon a waiver of the CRSTTA's tribal sovereignty, because the Commission incorrectly construed SDCL 49-1-17, and because the Commission failed to enter findings of fact on each of the statutory factors required to be considered under SDCL 49-31-59.[2]

FACTS AND PROCEDURAL HISTORY

US West's local telephone exchanges have long been regulated by the Commission under a dual, State Public Utilities Commission-Federal Communications Commission, regulatory scheme contemplated by the Communications Act of 1934 and SDCL Chapter 49-31.[3] In early 1994, US West

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[1] The McIntosh and Morristown exchanges are located on the Standing Rock Indian Reservation. The Commission also declined to approve the sale of one exchange not located on an Indian reservation (Alcester). That disapproval has not been appealed.

[2] Because the reasons for the reversal and remand only involve questions of law, this Memorandum Decision constitutes the Court's Findings of Fact and Conclusions of law. See SDCL 1-26-36 and 15-6-52(a). All disputes of fact have been affirmed and SDCL 1-26-36 does not require findings of fact and conclusions of law for "remands." Consequently, no additional findings of fact and conclusions of law will be required.

[3] See Communications Act of 1934, 48 Stat 1064, as amended, 47 USCS §§ 151 et seq. (providing for federal regulation of interstate and foreign communication by wire or radio and state regulation of intrastate communications and facilities);